

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

I. INTRODUCTION

1 for damages.

2 **II. BACKGROUND**

3 Except where otherwise indicated, the following allegations
4 are taken from Solaria's complaint. ECF No. 1-1 ("Compl."). In
5 November of 2012, Solaria and TSE entered into a contract for
6 Solaria to provide 1,000,000 watts of solar modules, module clamps,
7 and engineering support services for \$1,020,000.00. Compl. ¶ 9, Ex
8 1. On December 4, the parties supplemented the contract with a
9 change order (the "Change Order") specifying certain payment date
10 terms, including a final payment due on January 31, 2013. Id.
11 Solaria performed its obligations under the contract, but TSE
12 failed to make a final payment of \$484,816.10 on the contract
13 balance, due by January 31, 2013. Compl. ¶¶ 10-11.

14 Solaria brought suit in California state court on June 4,
15 2013. TSE retained counsel and removed the matter to federal court
16 on November 7, 2013. ECF No. 1. TSE answered the complaint on
17 November 27 and brought a counterclaim. TSE continued to
18 participate in this litigation until June of 2014, when TSE's
19 counsel filed a motion to withdraw because TSE had failed to pay
20 its attorneys' invoices and refused to respond to its attorneys'
21 requests for direction regarding the case. ECF No. 34. On July 3,
22 2014, the Court granted the motion to withdraw. TSE's lawyers'
23 withdrawal was conditioned on the attorneys' willingness to
24 continue to be served for forwarding purposes until TSE could
25 appear by other counsel. ECF No. 37. The Court gave TSE 30 days
26 to find new counsel and ordered TSE to file substitution of counsel
27 by August 4, 2014. Id. at 3. On August 1, 2014, the Court granted
28 TSE a 21-day extension, ordering it to file substitution of counsel

1 by August 25, 2014. ECF No. 43. TSE did not appear by the
2 required date, and Solaria moved for default judgment on September
3 16. To this date, TSE has still not filed a substitution of
4 counsel and has not responded to Solaria's motion.

5 **III. LEGAL STANDARD**

6 After entry of a default, the Court may enter a default
7 judgment. Fed. R. Civ. P. 55(b)(2). Its decision whether to do
8 so, while "discretionary," Aldabe v. Aldabe, 616 F.2d 1089, 1092
9 (9th Cir. 1980), is guided by several factors.

10 As a preliminary matter, the Court must "assess the adequacy
11 of the service of process on the party against whom default
12 judgment is requested." Bd. of Trs. of the N. Cal. Sheet Metal
13 Workers v. Peters, No. 00-0395, 2000 U.S. Dist. LEXIS 19065, at *2
14 (N.D. Cal. Jan. 2, 2001). If the Court determines that service was
15 sufficient, it may consider the following factors (the "Eitel
16 factors") in its decision on the merits of a motion for default
17 judgment:

18 (1) the possibility of prejudice to the
19 plaintiff, (2) the merits of plaintiff's
20 substantive claim, (3) the sufficiency of the
21 complaint, (4) the sum of money at stake in the
22 action; (5) the possibility of a dispute
23 concerning material facts; (6) whether the
24 default was due to excusable neglect, and (7)
25 the strong policy underlying the Federal Rules
26 of Civil Procedure favoring decisions on the
27 merits.

28 Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). "The
general rule of law is that upon default the factual allegations of
the complaint, except those relating to the amount of damages, will
be taken as true." Geddes v. United Fin. Group, 559 F.2d 557, 560

(9th Cir. 1977). Therefore, for the purposes of this Motion, the Court accepts as true the facts as presented in the Complaint, except those relating to the amount of damages.

IV. DISCUSSION

A. Adequacy of Service

In this case, adequacy of service is not at issue because the defendant has appeared, answered the complaint, and participated in this litigation. With respect to the motion for default judgment itself, Solaria served the motion upon TSE's former counsel pursuant to the Court's order granting the motion to withdraw. ECF Nos. 46-3, 46-4.

B. Default Judgment

After entry of a default, a court may grant a default judgment on the merits of the case. See Fed. R. Civ. P. 55. A default judgment may not be entered, however, against an infant or incompetent person unless represented in the action by a general guardian or other such representative who has appeared. See id. Furthermore, a default judgment may not be entered against an individual in military service until after the court appoints an attorney to represent the defendant. See 50 U.S.C. app. § 521. TSE is a business entity, not an individual, so none of those restrictions apply here. Accordingly, the Court may consider whether a default judgment may be entered against TSE.

Where a corporation repeatedly fails to appear by counsel, a default judgment may be entered against it. Grace v. Bank Leumi Tr. Co. of NY, 443 F.3d 180, 192 (2d Cir. 2006). Additionally, the majority of the Eitel factors favor default judgment.

1 1. Merits of the Claim, Sufficiency of the Complaint, and
 2 Prejudice to the Plaintiff

3 As discussed above, the merits of the plaintiff's claims and
 4 the sufficiency of the complaint are often analyzed together, and
 5 together they require that the plaintiff's allegations "are
 6 sufficient to state a claim on which the [plaintiff] may recover."
 7 Danning v. Lavine, 572 F.2d 1386, 1388 (9th Cir. 1978).
 8 "Additionally, while prejudice to the plaintiff is an independent
 9 factor . . . , such prejudice necessarily flows from the
 10 plaintiff's ability to demonstrate the merits of its claim because,
 11 in the absence of a default judgment, plaintiff would be without
 12 other recourse for recovery to which it is entitled." Dr. JKL Ltd.
 13 v. HPC IT Educ. Ctr., 749 F. Supp. 2d 1038, 1048 (N.D. Cal. 2010)
 14 (internal quotation marks omitted).

15 Under California law, the elements of a breach of contract
 16 claim are: (1) existence of a contract, (2) plaintiff's performance
 17 or excuse of non-performance, (3) defendant's breach, and (4)
 18 damage to plaintiff therefrom. Acoustics, Inc. v. Trepte Constr.
 19 Co., 14 Cal. App. 3d 887, 913 (Cal. Ct. App. 1971). Application is
 20 straightforward in this case.¹ Solaria pleads that a contract
 21 existed (and in fact attaches the order form as an exhibit to the
 22 complaint). Compl. ¶ 9, Ex. 1. Solaria has also pleaded its
 23 performance of its obligations under the contract. Id. ¶ 10.
 24 Solaria has alleged that TSE breached the contract by failing to
 25 pay the full amount owed. Id. ¶ 11. Finally, Solaria claims

26 ¹ Indeed, in its answer, TSE admitted the existence of a contract
 27 and that it failed to pay approximately \$460,000.00 to Solaria.
 28 ECF No. 14 ("Answer") ¶¶ 9, 11. However, TSE asserts that it was
 entitled to withhold its payment because Solaria breached the
 contract first. Id. ¶ 11.

1 damages in the amount of \$484,816.10, plus interest. Id. ¶ 12.
2 The Court finds that Solaria's allegations are sufficient to state
3 a claim upon which it may recover. Because TSE is no longer
4 participating in this case, Solaria will be unlikely to recover on
5 its claim without a default judgment. That result would
6 undoubtedly prejudice Solaria. These factors, therefore, favor
7 issuance of a default judgment.

8 **2. Amount of Money at Stake**

9 Pursuant to the fourth Eitel factor, "the court must consider
10 the amount of money at stake in relation to the seriousness of
11 Defendant's conduct." PepsiCo, Inc. v. California Sec. Cans, 238
12 F. Supp. 2d 1172, 1176 (C.D. Cal. 2002). Here, assessment of this
13 factor is again straightforward. The amount of money at stake is
14 the unpaid balance on the contract, plus interest. That amount is
15 a direct result of TSE's conduct: it is simply the amount that TSE
16 agreed, but failed, to pay. This factor also favors entry of
17 default judgment.

18 **3. Possibility of Dispute Concerning Material Facts**

19 The fifth Eitel factor considers the possibility of dispute as
20 to any material facts in the case. In many cases in which a
21 defendant faces a default judgment motion, that defendant has not
22 appeared at all. See, e.g., Ploom, Inc. v. Iploom, LLC, No. 13-CV-
23 05813 SC, 2014 WL 1942218, at *2 (N.D. Cal. May 12, 2014). In
24 those cases, the absence of the possibility of a dispute concerning
25 material facts is often easier to infer. Here, TSE appeared,
26 answered the complaint, and counterclaimed against Solaria. TSE
27 alleges that Solaria guaranteed to provide engineering support
28 under the contract but failed to do so. Answer at Counterclaim ¶¶

1 10, 17. Consequently, TSE asserted that it suffered damages
2 sufficient to justify its withholding of the final payment. Id. ¶¶
3 12, 18-26. Accordingly, there is not just the possibility of a
4 dispute concerning material facts -- there is a dispute concerning
5 material facts. This factor militates against entry of default
6 judgment.

7 **4. Whether Default Was Due to Excusable Neglect**

8 Defendants were ordered to appear by new counsel over five
9 months ago. The Court granted them an additional three weeks to
10 retain substitute counsel on August 1. There is no evidence in the
11 record that Defendants' failure to appear by new counsel and
12 otherwise defend was the result of excusable neglect. Defendants'
13 failure to comply with the Court's order, even after requesting and
14 obtaining an extension, indicates that failure to appear was
15 willful. This factor, too, favors entry of default judgment.

16 **5. Strong Policy Favoring Decision on the Merits**

17 Finally, the mere existence of Federal Rule of Civil Procedure
18 55(b) indicates that the seventh Eitel factor is not alone
19 dispositive. Pepsico, 238 F. Supp. 2d at 1177. Moreover, TSE's
20 failure to appear by counsel and defend this lawsuit makes
21 resolution on the merits difficult or impossible. "While modern
22 courts do not favor default judgments, they are certainly
23 appropriate when the adversary process has been halted because of
24 an essentially unresponsive party." Flynn v. Angelucci Bros &
25 Sons, Inc., 448 F. Supp. 2d 193, 195 (D.D.C. 2006) (internal
26 quotations omitted). Therefore, the seventh Eitel factor does not
27 preclude the Court from entering default judgment against
28 Defendants.

1 **6. Conclusion**

2 Five of the seven Eitel factors favor entry of default
3 judgment. One is neutral. The only one that does not -- the
4 possibility of a dispute concerning material facts -- has little
5 persuasive power given TSE's failure to defend itself.
6 Accordingly, the Court finds that the Eitel factors indicate that
7 entry of default judgment is appropriate. Therefore, Solaria's
8 motion for default judgment is GRANTED.

9 **C. Remedies**

10 "The general rule of law is that upon default the factual
11 allegations of the complaint, except those relating to the amount
12 of damages, will be taken as true." TeleVideo Sys., Inc. v.
13 Heidenthal, 826 F.2d 915, 917-18 (9th Cir. 1987) (quoting Geddes v.
14 United Fin. Grp., 559 F.2d 557, 560 (9th Cir. 1977)). "Rule 55
15 gives the court considerable leeway as to what it may require as a
16 prerequisite to the entry of a default judgment." TeleVideo, 826
17 F.2d at 917.

18 Here, the only evidence of the amount of Solaria's damages is
19 the amount prayed in the complaint. Solaria has provided no
20 evidence whatsoever of the amount claimed. But the Court does not
21 presume the amount of damages claimed in the complaint to be true.
22 In fact, this case illustrates quite well the reasoning behind this
23 rule: Solaria claims that TSE failed to make its final payment of
24 \$484,816.10 on January 31, 2013. But the Change Order specifies a
25 final payment due on January 31, 2013 of only \$389,700.00. Compare
26 Compl. ¶ 11, with Compl. Ex. 1. Without evidence to support the
27 amount of damages it claims, Solaria cannot recover actual damages.

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1 Under California law, "[a] plaintiff is entitled to recover
2 nominal damages for the breach of a contract, despite inability to
3 show that actual damage was inflicted upon him, since the
4 defendant's failure to perform a contractual duty is, in itself, a
5 legal wrong that is fully distinct from the actual damages." Sweet
6 v. Johnson, 169 Cal. App. 2d 630, 632, 337 P.2d 499, 500 (Cal. Ct.
7 App. 1959) (internal citation omitted). Rather than award only
8 nominal damages, however, the Court is willing to give Solaria
9 another chance to provide supporting evidence for its claimed
10 damages. Consequently, the Court declines to enter judgment at
11 this time. As explained further below, Solaria may supplement its
12 motion for default judgment with appropriate evidence to prove its
13 claimed damages.

14 **D. Counterclaim**

15 "If the plaintiff fails to prosecute or to comply with . . . a
16 court order, a defendant may move to dismiss the action or any
17 claim against it." Fed. R. Civ. P. 41(b). Rule 41(b) permits
18 dismissal with prejudice. Id.; see also Schenker, Inc. v.
19 Predator Mogulwear Inc., No. C 07-01795 WHA, 2007 WL 4556915, at *3
20 (N.D. Cal. Dec. 20, 2007) (a district court may dismiss an action,
21 with prejudice, based upon the failure to prosecute, the failure to
22 obey a court order, and the failure to comply with rules and
23 procedures). TSE has consistently failed to appear, despite two
24 court orders to do so and extension of time to retain new counsel.
25 TSE's failure to appear and to comply with the Court's orders
26 warrants dismissal of its counterclaims with prejudice.

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1 **V. CONCLUSION**

2 For the reasons set forth above, the Court hereby DIRECTS the
3 clerk to enter Defendant T.S. Energie e Risorse, S.R.I.'s default
4 and GRANTS Plaintiff Solaria Corporation's motion for default
5 judgment against TSE. Because Solaria has failed to substantiate
6 its damages claim, however, the Court declines to enter judgment at
7 this time. Solaria is hereby ORDERED to submit to the Court,
8 within twenty-one (21) days of the signature date of this Order,
9 evidence sufficient to support its claimed amount of damages.
10 Failure to do so may result in entry of judgment with an award of
11 nominal damages only. Finally, due to TSE's repeated failure to
12 appear and to obey court orders, TSE's counterclaims are DISMISSED
13 WITH PREJUDICE.

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15 IT IS SO ORDERED.

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17 Dated: December 17, 2014

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19 UNITED STATES DISTRICT JUDGE
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